IN THE HIGH COURT OF BOMBAY AT GOA

APPEAL UNDER ARBITRATION ACT NO. 2 OF 2005.

1. Union of India,
   represented by Chief Engineer (Navy),
   Mumbai, Assaye Buildings,
   Colaba, Mumbai-400 005.

2. CWE (Navy) Vasco,
   Vasco-da-Gama, Goa 403802.

3. Garrison Engineer Gomantak,
   Vasco-da-Gama,
   Goa 403 802. .... Appellants.

Versus

M/s. Shah Builders,
403, S.V. Patel Street,
Camp Pune – 411 001. .... Respondent.

Shri E.P. Badrinarayanan, Addl. Central Government Standing Counsel for the Appellants.

Shri D. V. Patkar, Advocate for the Respondent.

CORAM: J. N. PATEL, J.

DATE: 15th DECEMBER, 2006.

ORAL JUDGMENT:

The appellants have taken exception to the Order dated 11th March, 2005 passed by the 1st Additional District Judge, South Goa, Margao in granting injunction against the appellants in invoking the Bank Guarantee by way of interim relief.

2. It is the case of the appellants that the respondent was allotted work of provision of Additional Hanger and allied works at INS Hansa by Work Order dated 28.6.91. On 9.7.91 Work Order No.1 was issued by Garrison Engineer Sea Bird, Vasco-da-Gama with effect from 15.7.91. As per the terms of the contract under which the Work Order was issued, the respondent was required to furnish Bank Guarantee in the sum of Rs.1,50,000/- towards Retention Money and accordingly on 3.8.91 the respondent furnished Bank Gaurantee in the sum of Rs.1,50,000/- from the Union Bank of India, Pune Branch in favour of the appellants. On 14.1.93 work was completed and therefore the respondent was informed that the final bill has been prepared and under finalization and intimated that Schedule 'B' stores is overdrawn and requested Respondent to attend the office for finalization by their letter dated 10.07.99 respondent was called upon to return Schedule 'B' Stores which was overdrawn by 5.10.99, failing which the Department would be forced to recover recovery at double the market rate to which the respondent replied by notice dated 25.9.99 denying the claim. Therefore on 5.3.03 the appellants put the respondent on notice that recovery be made under Condition No.10(B) of IAFW 2249 of General Conditions of Contract which was disputed by the respondent by their letter dated 9.5.03. On 1.9.04 the respondent extended the Bank Guarantee upto 30.09.2005. On 2.12.04 the respondent requested for appointment of Arbitrator under Condition No.70 of IAFW 2249 of

General Conditions of Contract. In the meantime by communication dated 9.12.04 Military Receivable Order (MRO) for Rs.1,95,696.40 was forwarded to the respondent for effecting payment and was also informed that the claim forwarded by the respondent was not agreeable to the appellants. In the meantime the respondent approached the Trial Court and filed an application under Section 9 of Arbitration & Conciliation Act, 1996 and sought injunction against the appellants restraining them from invoking the Bank Guarantee and also approached this Court for appointment of Arbitrator under Section 11 of the Arbitration and Conciliation Act which was disposed of by this Court by referring the dispute to an Arbitrator. In the meantime the District Judge on 11.3.05 passed the impugned order on 5.5.05 in Arbitration Petition No.2/2005.

3. It is in this set of facts that the impugned order is challenged by the appellants on the ground that the trial Court could not have granted injunction under Section 9 of the Arbitration and Conciliation Act, 1996 preventing the appellants from enforcing the Bank Guarantee. It is submitted that now it is well settled by a catena of decisions that Bank of Guarantee can be invoked by a party in whose favour it has been given independent of the dispute arising out of a contract and therefore the trial Court erred in arriving at a conclusion that the claim has not crystallized for appropriation. The appellants cannot be permitted to encash the Bank Guarantee and therefore the impugned order deserves to be quashed and set

aside.

4. The learned counsel appearing for the respondent submitted that the arbitration proceedings are in process and the claim and counter claim between the parties is being adjudicated and therefore it is after the Award is passed by the Arbitrator the respective claims of the parties would get crystallized and in case the appellants are found entitled to the amount claimed under the MRO, it will be open for them to invoke the Bank Guarantee. But otherwise if the appellants are permitted to encash the Bank Guarantee, it will be unjust to the respondent who will be put to irreparable loss as the appellants would be benefitted by encashing the Bank Guarantee. It is further submitted that the District Court was justified in granting the injunction in favour of the respondent as the appellants have not been able to justify the right to invoke the Bank Guarantee and their claim is subject to the Award which will be passed in the arbitration proceedings.

5. This Court finds that the District Court has passed the impugned order against the settled principle relating to invocation of Bank Guarantee. The two decisions which are directly on the point as to whether during pendency of the arbitration proceedings the Bank Guarantee by the contractor can be encashed squarely covers the issue.

6. First is the case of ***National Thermal Power Corporation Ltd. v. M/s. Flowmore Pvt. Ltd. 1995(2) Arbitration Law Reporter, 185*** in which it was held :-

> " The bank guarantees are unconditional and payable on demand. The circumstances pointed out by Learned counsel for the first-respondent do not constitute a bar on the right of the appellant to encash the bank guarantees. In the present case there is also no circumstance pointed out which would result in any irretrievable injustice to the first-respondent of the kind referred to in the case of *Itek Corporation, 566* Feb. supp. 1210 if the bank guarantees are realised. In the premises, the Delhi High Court was not justified in issuing an order of injunction to restrain the realisation of the bank guarantees by the appellant. "

7. The other case is of ***Ansal Engineering Projects Ltd. v. Tehri Hydro Development Corporation Ltd. and another (1996 (Suppl.) Arb. LR 344)*** where the three Judge Bench of the Supreme Court reiterated the principle and held :-

> " The liability of the bank is absolute and unequivocal, it would thereby be clear that the bank is not concerned with the ultimate decision of a court and a tribunal in its finding after adjudication as to

> the amount due and payable by the petitioner to the first respondent. What would be material is the quantification of the liability in the letter of revocation. The bank should verify whether the amount claimed is within the terms of the bank guarantee or letter of credit. It is axiomatic that any payment by the bank, obviously be subject to the final decision of the court or the tribunal. At the stage of invocation of bank guarantee, the need for final adjudication and decision on the amount due and payable by the petitioner, would run contrary to the terms of the special contract in which the bank had undertaken to pay the amount due and payable by the contractor. Thus, we hold that there is no question of making out any prima facie case much less strong evidence or special equity or exceptional circumstances for interference by way of injunction. ”

8. This Court therefore holds that the learned District Judge erred in complying with the principle of prima facie case, balance of convenience and irreparable loss while granting injunction in favour of the respondent which had no nexus to the subject matter in issue. And therefore the impugned order is quashed and set aside. It will be open for the appellants to invoke the Bank Guarantee which is in force.

9. The appeal stands disposed of accordingly with costs.

J. N. PATEL, J.

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